IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO.569 OF 1991

1. Mahiboobsaheb Kujruksaheb Harkare
age 75 yrs., Occ: Retired

2. Hajrabee w/o. Mahiboobsaheb Harkare
since deceased by her legal heirs:

2A. Mahiboobsaheb Kujruksaheb Harkare,

2B. Ismail Mahiboobsaheb Harkare

2C. Abdulkhaliq Mahiboobsaheb Harkare

2D. Iqbal Mahiboobsaheb Harkare

2E. Khatibabi Abduljabbar Pathan

2F. Bibi Mahiboobsaheb Shaikh

1, 2A to 2D & 2F residents of 819,
Shukrawar Peth, Dist.Solapur and
2E resident of 816, Shukrawar Peth,
Dist. Solapur. Appellants
(Org. Defendants)

Vs.

1. Yakubsaheb Saifansaheb Qureshi,
age 61 yrs., Occ: Business

2. Asarani w/o. Yakubsaheb Qureshi,
age 56 yrs., Occ: Household

Both residing at 815,
Shukrawar Peth, Solapur. Respondents
(Org. Plaintiffs)

Mr.Girish S. Godbole for appellants.

Mr.A.P.Kulkarni h/f. Mr.A.A. Kumbhakoni for respondents.

CORAM: B.H. MARLAPALLE, J.

December 23, 2005.

ORAL JUDGMENT:

1. This Second Appeal arises from the decree for specific performance passed by the learned 2nd Joint Civil Judge, Junior Division at Solapur in Regular Civil Suit No.713 of 1980 on 21/3/1987 and duly confirmed by the learned Additional District Judge at Solapur vide his judgment and order dated 8/3/1991 by which Civil Appeal No.390 of 1987 came to be dismissed. While admitting the Second Appeal this Court framed the substantial question of law as under:

"Whether the discretion to decree specific performance has been properly exercised."

2. Admittedly the suit property viz. Municipal House No.819 located in City Survey No.4617 of Solapur city admeasuring 29 sq. yards was agreed to be sold to the plaintiffs by the defendants (present appellants) vide the agreement for sale dated 6/2/1980 (Exh.4/2) for consideration of Rs.18,000/-

and an amount of Rs.8,000/- from the said consideration was already paid to the defendants when the agreement was signed. As per the said agreement the balance amount of Rs.10,000/- was payable on signing the sale deed within a period of one month on obtaining the legal permissions. The defendants obtained the permissions under the Urban Land (Ceiling and Regulation) Act, 1976 on 2/4/1980 and the same was handed over by the defendants to the plaintiffs. However, the defendants did not respond to take steps to sign the sale deed within thirty days from obtaining the said permission, as alleged by the plaintiffs. The plaintiffs, therefore, issued a legal notice dated 13/4/1980 and the same was replied to by the defendants on or about 23/4/1980. The suit was filed before the trial Court on or about 14th July 1980. The defendants filed the written statement at Exhibit 13 and opposed the suit on the ground that the agreement for sale dated 6/2/1980 was conditional and unless House No.815, Shukrawar Peth, Solapur, which was in occupation of the plaintiffs was handed over to the defendants, the suit house No.819 could not be transferred by signing the sale deed with the plaintiffs and as per the defendants such a condition was by way of further agreement.

2A. On behalf of the plaintiffs, Plaintiff No.1 - Yakubsaheb Qureshi came to be examined as PW 1 and Abdul Hamid Abaji came to be examined as PW 2 whereas for the defendants, Defendant No.1 appeared as DW 1, Sayad Ahmed Khan as DW 2 and Harun Qureshi as DW 3. The trial Court examined the oral as well as documentary evidence as adduced by both the parties and the scheme of Section 92 of the Evidence Act, 1872 and held that the plaintiffs had proved that the agreement for sale was signed by the defendants by accepting the earnest amount of Rs.8,000/-, the defendants had denied to execute the sale deed as agreed and, therefore, the plaintiffs were entitled for specific performance as sought for. The operative part of the decree reads as under:

> "The suit of the Plaintiff for specific performance of the contract in respect of the suit property on the basis of the alleged sathe khat dated 6th February 1980 is hereby decreed with costs.
>
> The Plaintiff Nos.1 and 2 shall pay the remaining amount of consideration of Rs.10,000/- to Defendant Nos.1 and 2 within one month from the date of this judgment. Thereupon, the defendant Nos.1 and 2 shall execute the sale deed of the suit house in favour of the Plaintiffs within 15 days after the payment of consideration amounts. However, the defendant Nos.1 and 2 are directed to hand over the possession of the suit property to the Plaintiffs within two

> months from date of this judgment. On defendants' failure to execute the sale deed, the Plaintiff Nos.1 and 2 are kept at their liberty to get the sale deed executed through the Court."

3. The lower Appellate Court reconsidered the evidence adduced by both the parties in the appeal filed by the defendants and confirmed the findings recorded by the trial Court including the findings on the issue of comparative hardship under Section 20 of the Specific Relief Act, 1963.

4. Mr.Godbole, the learned counsel for the defendants reiterated the existence of subsequent oral agreement between the parties as being a condition precedent for signing the sale deed in terms of the agreement for sale dated 6th February 1980 (Exhibit 4/2) and submitted that the said oral agreement was duly proved by the defendants by adducing the evidence before the trial Court. As per Mr.Godbole both the Courts fell in manifest error in recording that such an agreement was not proved by the defendants. The additional point of comparative hardship was also reiterated by relying upon the following decisions:

. (1) Mademsetty Satyanarayana v. G. Yelloji Rao **(AIR 1965 SC 1405)**, (2) Parakunnan Veetill Joseph's son Mathew vs. Nedumbara Kuruvila's son **(AIR 1987 SC 2328)** and (3) Gobind Ram vs. Gian Chand **(AIR 2000 SC 3106)**.

5. The evidence on record shows that the defendants denied the execution of the sale deed on the basis of an oral agreement which never existed. The defendant no.1, who is no more now, was an educated person and retired from service from a mill at Solapur. The suit property belonged to him and his wife was defendant no.2. The agreement for sale did not contain any such pre-condition as alleged by the defendants which is obvious from the official translation of below quoted portion from the sale deed (original in Marathi):

> " Thus I have 1/2 undivided ownership share in the 'jaga' (i.e. land or premises) bearing C.S.No.4617 enclosed within the four boundaries as above. We have voluntarily decided to sell to you the same together with all structures stones, earth, walls, 'paikhana' (i.e. a latrine) and open space etc. appurtenances thereto for the sum of Rs.18,000/- (Eighteen Thousand) and have accepted on this day the amount of Rs.8,000/- (eight thousand) in cash towards earnest money. We shall accept the remaining amount at the time of sale deed and shall execute sale deed in your name without any objection.

> For the said purchase transaction, permission under law is required and we shall obtain the same at our own cost and shall execute sale deed without any objection, within one month from receipt of the said permission.
>
> During the said period, both the parties shall complete purchase transaction. In default thereof, you as well as we shall have the right to get it completed through Court.
>
> We shall get the said 'jaga' surveyed and shall get the boundaries thereof fixed.
>
> We shall sell to you said 'jaga' free from any dispute and charge. We shall pay Municipal taxes till the execution of sale deed.
>
> We shall bear all the expenses towards the sale deed and shall hand over to you the actual possession of the 'jaga' at the time of sale."

In the reply to the legal notice (Exhibit 25 - original in Marathi) the defendants for the first time stated thus:

> "The 'jaga' (i.e. premises) bearing Municipal No.815, Shukravar Peth, Solapur, which is in the possession of your client, is of the ownership of Smt.Hajarabai w/o Mehboob Harkare, No.2 out of my clients and seven other persons and as your client had agreed to hand over the said 'jaga' into the possession of Smt.Hajarabi w/o Mehboob Harkare, my clients No.1 and 2 had decided to reside in the said 'jaga' after my client no.2 would get the possession thereof. Even today they continue to think in the same manner. Had your client not agreed to hand over possession of 'jaga' bearing Municipal No.815 to No.2 out of my clients, my clients would have never

agreed to sell to your client the 'jaga' bearing Municipal No.819. In short although my clients had agreed to sell to your client the 'jaga' bearing Municipal No.819 only on the abovementioned condition, your client is asking to execute sale deed only in respect of Municipal No.819 by avoiding to vacate the 'jaga' bearing Municipal No.815, Shukravar Peth thereby avoiding to comply with said condition."

. In the said reply it was also admitted that the so called condition of vacating House No.815 was not set out in the agreement for sale but was was so done because of the trust the defendants had in the plaintiffs. However, in the written statement filed at Exhibit 13 the defendants emphasized the existence of a subsequent agreement to the effect that the sale deed would not be signed unless the House No.815 in the possession of the plaintiffs was handed over to the defendants. In the written statement the defendants emphasized that the plaintiffs had entered into such an agreement in writing. These averments in the written statement could not be proved by any evidence, either oral or documentary, by the defendants. The two witnesses examined by the defendants i.e. Sayad Ahmed Khan (DW 2) and Harun Qureshi (DW 3) did not utter any word regarding a subsequent agreement after the agreement for sale was

signed between the parties regarding the condition of return of House No.815 for signing the sale deed in respect of suit house bearing no.819. In respect of the said alleged agreement beyond the oral statement of the defendant no.1 in the witness box there was no further evidence and the stand regarding this subsequent agreement has not been consistent if regards be had to the reply to the legal notice, written statement and the oral depositions. The Courts below, therefore, rightly held that such a supplementary agreement, either oral or documentary, never existed and the defendants could not prove the existence of such an agreement.

6. Section 92 of the Indian Evidence Act states that when the terms of any contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. The signing of the agreement for sale at Exhibit 4/2 has not been disputed by the defendants

and in fact the execution of the said document has been proved by examining PW 2 as one of the attesting witnesses. However, the learned counsel for the defendants relying upon proviso (2) and (3) below Section 92 of the Evidence Act submitted that the defendants were entitled to prove the existence of supplementary oral agreement between the parties constituting a condition precedent for execution of the sale deed pursuant to the agreement for sale. However, as noted earlier, in this pursuit also the defendants failed inasmuch as there was no evidence worth considering in support of any such subsequent agreement.

7. On the last point of comparative hardship it has been observed by both the Courts below that the properties in House Nos.815, 816 and 916 belonged to the father of the original defendant no.2 and she was not the exclusive owner of the same. The evidence has also been placed on record to show that the property in House No.916 came to be sold during the pendency of the suit and the defendants' witness DW 3 Harun Qureshi in his cross-examination admitted that in addition to the suit house the defendants were also occupying House No.816. In addition the

evidence also shows that House No.815 was constructed by borrowing an amount of Rs.3000/- from the plaintiffs and an agreement to that effect was signed in 1969. The Courts below, therefore, held that signing of this agreement had no connection with the transaction in terms of the agreement for sale (Exhibit 4/2) and this finding is required to be upheld. So far as the contention of the defendants that they will be homeless if the decree for specific performance is executed is concerned, it is required to be noted that the defendants have taken such a plea by way of an after thought and the plea is not supported from any evidence on record. As noted earlier, the defendant no.1 was an educated person whereas plaintiff no.1 was an illiterate person. The defendant no.1 with his eyes open executed the agreement for sale without any condition to vacate the Municipal House No.815 by the plaintiffs so as to transfer the suit house by signing the sale deed. He could not be allowed to take the plea of comparative hardship when both the Court below recorded a finding that such a plea could not be proved and in any case DW 3 admitted that the defendants were in occupation of House No.816. The Courts below have assessed the arguments advanced by both the parties on this issue

of comparative hardship and rightly held that it was not required to be considered in favour of the defendants. The decisions cited by the learned counsel for the defendants and as referred to hereinabove are not applicable in the facts of this case. The trial Court did not commit any error in decreeing the suit for specific performance and the lower Appellate Court on re-assessment of evidence has rightly confirmed the said decree. The substantial question of law as framed in this Second Appeal, therefore, stands answered against the defendants.

8. In the premises this appeal fails and the same is hereby dismissed with costs. Interim order, if any, stands vacated.

(B.H.MARLAPALLE,J.)